IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

COMPANY PETITION NO.599 OF 2006

Shri B. D. Rao. ...Petitioner.
Vs.
Pioneer Distilleries Ltd. ...Respondent.
....
Mr. Gaurav Kothari with Mr.Shaikesh Poria i/b. Deven Dwarkadas & Partner for the Petitioner.
Mr. D.B. Sawant for the Respondent.
.....
CORAM :DR.D.Y.CHANDRACHUD, J.
April 11, 2007.

P.C.:

By a Memorandum of Agreement dated 21st July 1999, the Petitioner agreed to invest a sum of Rs.100 lakhs with the Respondent, of which an amount of Rs.25 lakhs was to be invested on or before 31st July 1999 and an amount of Rs.75 lakhs on or before 30th September 1999. It is undisputed that the aforesaid amount was invested. The Company was to issue 10 lakh equity shares each of the face value of Rs.10/- to the Petitioner and to the members of his family in proportion to the amount invested. There is no dispute about the factual position that the Company allotted a total of 5 lakh equity shares of a total face value of Rs.50 lakhs. An agreement was entered into on 24th August 2001 between the

Petitioner and the Respondent, the material clauses of which are as follows :

> "1. The Company (M/s.Pioneer Distilleries Ltd.,) has borrowed Rs. 50.00 lakhs only) as unsecured loan from Sri. B.D. Rao on 18th August, 1999.
>
> 2. The Company has already paid Rs. 23.00 lakhs (Rupees Twenty three lakhs only) till the 11th July 2001.
>
> 3. The Company agrees and undertakes to pay the remaining amount of Rs. 27.00 lakhs (Rupees Twenty seven lakhs only) with interest @ 18.92% p.a. from 18th August 1999 till the payment of the balance unsecured loan.
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> 4. The interest is to be calculate every quarterly on Simple Interest basis."

The agreement, therefore, clearly stipulated that the balance of the amount of Rs.50 lakhs in respect whereof the Company had failed to allot shares to the Petitioner, would be converted into a loan. An amount of Rs.23 lakhs was paid by 11th July 2001 and the balance of Rs.27 lakhs was to be repaid together with interest at 18.92% per annum from 18th August 1999. On 11th July 2003, a meeting was held between the Petitioner and the promoters of the Company by which the promoters agreed that an amount of Rs.20 lakhs approximately would be paid upto 31st December 2003 in

instalments towards interest. The Petitioner was to be approached for a reduction in the amount of interest but the rate of interest was left to his discretion.

Now, it is an admitted position that the balance of the principal amount of Rs.27 lakhs which was due and outstanding was in fact, paid by 24th June 2003. A statement to that effect is contained in Para 2(f) of the affidavit in reply filed on behalf of the Company. Undisputedly, the quantum of interest remained to be paid and the Company Petition for winding up has been instituted on that ground.

In para 2(d) of the affidavit in reply filed on behalf of the Company, the agreement dated 24th August 2001 (Exh.F) has not been disputed. In fact, the liability to pay interest at the rate of 18.92% per annum from August 1999 until repayment is reiterated in the aforesaid paragraph of the reply. In para 2(h) of the reply, there is also a reference to the Minutes of the Meeting dated 11th July 2003 and to the fact that the payment of interest of Rs.20

lakhs was agreed upon, subject to the Petitioner agreeing to reduce the rate of interest. The defence, however, in para 2(i) is that an amount of Rs.2 lakhs was paid on 17th December 2004 and a further amount of Rs.1 lakh was paid on 17th January 2005 for the buy back of the shares that were allotted to the Petitioner. However, in para 4 of the reply, it has also been submitted that in the event that the parties had agreed to the payment of interest of Rs.20 lakhs, the amount of Rs.3 lakhs must be treated as having been received by the Petitioner towards that amount.

The buy back agreement between the promoters of the Company and the Petitioner which was entered into on 24th August 2001 has no bearing on the liability of the Company to pay interest in terms of the agreement at Exh.F. The buy back agreement related to 5 lakh shares of the face value of Rs.50 lakhs. That was independent of the liability of the Company to repay the balance of the amount of Rs.50 lakhs which was converted into a loan. In fact, as a matter of fact, the Company repaid the amount of Rs.50 lakhs. The repayment of that amount, treating it as a loan, is only

relatable to the agreement dated 24th August 2001 which has already been extracted in the earlier part of the judgment. Clause 3 of that agreement specifically provides for the payment of interest on the loan which has admittedly not been paid. However, having regard to the facts and circumstances of the case, it would not be appropriate for this Court to pass a decree in the Company Petition for winding up, particularly having regard to the judgment of the Supreme Court in **Mediquip Systems (P) Ltd. vs. Proxima Medical System GMBH.**[1] Having regard to the Minutes of the Meeting held on 11th July 2003, it would be appropriate to direct that the Respondent should deposit an amount of Rs.17 lakhs (after giving due adjustment to the amount of Rs.3 lakhs which as stated in para 2(i) of the reply was paid). The Petitioner, on the deposit of the aforesaid amount would have to file a Regular Civil Suit for the recovery of its debts. The exercise of the jurisdiction in the Company Petition for winding up and an order in the following terms is warranted since the liability of the Respondent to pay interest is crystalised and there is a that due the debt on the basis of the agreement dated 24th August 2001 (Exh.F).

1 (2005) 7 SCC 42

Hence, the following order :

(i) Within a period of 8 weeks from today, the Respondent shall deposit with the Prothonotary and Senior Master, an amount of Rs.17 lakhs towards the claim of the Petitioner for interest in pursuance of the agreement dated 24th August 2001;

-(ii) An intimation of the deposit shall be furnished by Counsel for the Respondent to Counsel for the Petitioner;

-(iii) Upon intimation of deposit in terms of clause (ii), the Petitioner would be at liberty to file a suit for recovery of its dues on account of interest. The amount so deposited in terms of clause (i) shall lie to the credit of the suit and shall abide by the final decree that would be passed in the suit;

-(iv) Pending disposal of the suit, the Prothonotary and Senior Master, shall invest the amount in a fixed deposit of a Nationalised Bank to be renewed periodically;

(v) In the event that the Respondent fails to deposit the

amount within the period of 8 weeks as stipulated earlier, the Company Petition to stand admitted and shall thereupon be advertised in two local newspapers, namely, “Free Press Journal”, “Navshakti” and in the Maharashtra Government Gazette. The Petitioner shall deposit an amount of Rs.10,000/- with the Prothonotary & Senior Master towards the publication charges, within three weeks of the Petition standing admitted with intimation to the Company Registrar, failing which the Petition shall stand dismissed for non-prosecution;

(vi) In the event that the Petitioner fails to institute a suit and furnish intimation thereof to the Advocate for the Respondent within a period of four months from the date of deposit, the Respondent would be at liberty to apply in these proceedings for the discharge of the secutiry.

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